IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES LOVETT,	§	
	§	No. 269, 2011
Plaintiff Below-Appellant,	§	
	§	Court Below: The Superior Court of the State of Delaware in and for Kent County,
v.	§	
	§	
ANDREW PIETLOCK, Individually and as agent for the DELAWARE STATE POLICE and STATE OF DELAWARE,	§	C.A. No. 09C-12-031
	§	
	§	
	§	
Defendants Below-Appellees.	§	

Submitted: September 27, 2011
Decided: November 8, 2011

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 8th day of November 2011, it appears to the Court that:

(1) Plaintiff-Below/Appellant, Charles Lovett, appeals from 1) a Superior Court order granting a motion for reargument by Defendants-Below/Appellees Andrew Pietlock, individually and as agent for the Delaware State Police and the State of Delaware, and denying Lovett's motion for leave to amend his complaint; 2) an order denying Lovett's motion for relief and/or reargument; and 3) an order granting summary judgment in favor of Defendants Delaware State Police and State of Delaware. We find no merit to the appeal and affirm.

(2) On December 17, 2007, Delaware State Police obtained a search warrant for a resident of 118 Unity Lane in Greenwood, Delaware. Three days later, members of the Delaware State Police executed the search warrant on 162 Unity Lane, Charles Lovett's residence, instead of 118 Unity Lane.

(3) On December 17, 2009, Lovett filed a complaint against the Delaware State Police and Corporal Andrew Pietlock. Lovett alleged that the police officers "handcuffed him, pointed loaded weapons in his direction, used racial epithets and assaulted him during the execution of the search warrant." Pietlock and the Delaware State Police were served with copies of the summons and complaint on February 5, 2010. Four days later, the Department of Justice ("DOJ") entered an appearance on behalf of the defendants and forwarded the relevant police reports to Lovett. On April 23, 2010, 127 days after filing the complaint, Lovett moved for leave to amend the complaint under Rule 15(c) to name as defendants three State employees who executed the search warrant: Michael Berry, Charles Condon, and Brian Fitzpatrick. But unless the proposed amendment related back to the date the original complaint was filed, any action against these proposed additional defendants would be barred by the two year statute of limitations.[1]

(4) Lovett contends that he intended to file a motion to amend the complaint on April 16, the 120-day time limit for service of the summons and

[1] 10 *Del. C.* § 8119.

complaint,[2] but that due to e-filing issues the motion was not accepted until April 23. A motion to extend time for service on the three additional defendants was e-filed on April 16. Lovett also states that he e-mailed a copy of the motion to amend to Deputy Attorney General Michael Tupman, who represented Pietlock, on April 16.

(5) A Superior Court Commissioner granted Lovett leave to amend on August 25, 2010. Five days later, the defendants moved for reargument, arguing that there was no evidence that the three additional defendants had notice of the institution of the action within the 120-day period provided for service of the summons and complaint, as required by Rule 15(c)(3)(A).

(6) The Superior Court granted the defendants' motion for reargument and denied Lovett's motion for leave to amend the complaint. The Superior Court also denied Lovett's motion for relief from and/or reargument of that motion. One month later, the Superior Court granted the motion for summary judgment in favor of defendants. This appeal followed.

(7) Lovett first contends that the Superior Court improperly denied his motion for leave to amend the complaint to add the three additional defendants. Superior Court Rule 15(c) contains three requirements for an amended complaint to relate back to the date of the original complaint:

[2] Super. Ct. Civ. R. 4(j).

> First, the claim asserted by the amendment must arise out of the same conduct, transaction or occurrence asserted in the original pleading. Second, within the time provided by the rules, the party to be added must have received notice of the institution of the action, so that the party will not be prejudiced. Third, within the time provided by the rules, the party to be added must have known or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be added by the amendment.[3]

"Rule 15, subsection (c)(3) includes no discretionary powers for the Superior Court to exercise."[4] Thus, Lovett's amended complaint must meet all three requirements to relate back to the date of the original complaint and avoid the statute of limitations.[5]

(8) The parties do not dispute that Lovett satisfied the first requirement because the claim arose out of the same occurrence. As for the second requirement, deposition testimony indicates that Fitzpatrick had notice of the institution of the action within 120 days of the filing of the complaint because he gathered paperwork relating to the lawsuit. Lovett relied on two federal law theories—the shared attorney theory and identity of interest theory—to argue that Berry and Condon received constructive notice during the 120-day period.

(9) We have found the federal courts' interpretation of Federal Rule of Civil Procedure 15 persuasive in our interpretation of Superior Court Civil Rule

---

[3] *Taylor v. Champion*, 693 A.2d 1072, 1074. (Del. 1997).
[4] *Id.*
[5] *Id.*; *Chaplake Holdings Ltd. v. Chrysler Corp*., 766 A.2d 1, 6 (Del. 2001).

15.[6] Under the shared attorney theory, which has been used to impute notice to other governmental officials, the Third Circuit has required "[that] there was 'some communication or relationship' between the shared attorney and the John Doe defendant prior to the expiration of the 120-day period[.]"[7] Here, there was no evidence of communication or a relationship between the Deputy Attorney Generals representing Pietlock and Berry and Condon that would have allowed for communication of notice.

(10) Nor can the identity of interest theory establish the requisite notice here. The Third Circuit has explained: "[i]dentity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other."[8] The identity of interest theory, typically used to impute notice between a parent and subsidiary,[9] does not provide for notice here. Accordingly, Lovett failed to meet the second requirement as to Berry and Condon.

(11) The third requirement speaks of "a mistake concerning the identity of the proper party[.]" The Superior Court found Lovett failed to meet this requirement, stating: "where the plaintiff cannot demonstrate an intent to include

---

[6] *See Chaplake Holdings, LTD. v. Chrysler Corp.*, 766 A.2d 1, 6 n.3 (Del. 2001).
[7] *Garvin v. City of Philadelphia*, 354 F.3d 215, 225 (3rd Cir. 2003) (citing *Singletary v. Pennsylvania Dep't of Corrs.*, 266 F.3d 186, 196-97 (3d Cir. 2001)).
[8] *Singletary*, 266 F.3d at 197 (internal citations omitted).
[9] *Johnson v. Geico Cas. Co.*, 673 F.Supp.2d 244, 249 (D. Del. 2009).

the unnamed party before the limitations period expired, the court will hold that this element is not satisfied." The Superior Court also found that Lovett's failure to e-file the amendment properly within the 120-day timeline was not the kind of "mistake" contemplated by Rule 15(c).[10] Relying in part on the recent United States Supreme Court decision *Krupski v. Costa Crociere S.p.A*, Lovett contends that the Superior Court misconstrued the word "mistake."[11]

(12) This Court has recognized that a Rule 15(c) "mistake" is not limited to cases of misnomer or identity of interest between a named defendant and the party to be added. "[T]he reach of Rule 15(a) may extend to bring in separate entities, not originally named as defendants, and to permit such amendment after the statute of limitations has expired if the requirements of Rule 15(c) are satisfied."[12] The United States Supreme Court construed the equivalent federal rule in *Krupski* to "resolve tension among the Circuits" over the rule's breadth.[13] The Supreme Court held that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading."[14] Even so, Lovett has not satisfied the third requirement for the reasons explained below.

---

[10] *Id*.
[11] 130 S.Ct. 2485, 2492, 177 L.Ed.2d 48 (June 7, 2010).
[12] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993) (internal citations omitted).
[13] 130 S.Ct. 2485, 2492, 177 L.Ed.2d 48 (June 7, 2010).
[14] *Id*. (emphasis added).

(13) The third requirement of Rule 15(c) demands that the additional parties "knew or should have known" that, but for the mistake, they would have been named in the complaint. In *Mullen v. Alarmguard of Delmarva, Inc.*,[15] we construed this provision of Rule 15(c) to find a motion to amend proper. In *Mullen*, the plaintiff had conducted a deposition of the company president, one of the named defendants, prior to the running of the statute of limitations.[16] At the deposition, which the president's wife attended, the plaintiff stated that the purpose of the questioning was to determine whether to add other parties as defendants.[17] During the deposition, the president provided misleading answers regarding his wife's role in the company.[18] In this situation, we "concluded that the wife knew or should have known that but for a mistake concerning the identity of the party, she would have been named as a defendant."[19]

(14) Here, deposition testimony indicates that Fitzpatrick assisted Pietlock in gathering documents for the lawsuit, such as the search warrant, during the 120-day period. And under *Krupski*, Lovett's mere failure to add Fitzpatrick prior to April 23 does not, on its own, allow Fitzpatrick to argue that he believed Lovett "had made a deliberate and informed decision not to sue [the three additional

[15] 625 A.2d 258, 264 (1993)
[16] *Id*. at 261.
[17] *Id*.
[18] *Id*.
[19] *Taylor*, 693 A.2d at 1076 n.3 (citing *Mullen*, 625 A.2d at 264).

defendants] in the first instance."[20] But, Lovett failed to show any particular reason why Fitzpatrick should have known prior to April 16 that he would have been named as a defendant in the original complaint but for a mistake of identity. Unlike the wife in *Mullen*, Fitzpatrick had no reason to know of any mistake on Lovett's part. Lovett's claim that he faxed a motion to amend the complaint to the Attorney General's Office on April 16—the 120-day deadline—does not require a different result. Fitzpatrick testified that Deputy Attorney General McTaggert, Pietlock's prior attorney, had asked him for information regarding the lawsuit—presumably before the substitution of counsel in February. But there is no evidence of communications between Fitzpatrick and Deputy Attorney General Tupman regarding the April 16 fax. Similarly, there is no evidence that Berry or Condon had reason to know they would have been named in the original complaint but for a mistake. Tupman also represented to the Superior Court that he did not have any contact with Fitzpatrick, Berry or Condon after the complaint was filed.

(15) *Chaplake Holdings Ltd. v. Chrysler Corp.*,[21] cited by Lovett, is distinguishable on its facts. In *Chaplake*, the party to be added under Rule 15(c) had been part of the action initially and thus knew it potentially faced claims for

[20] *See Krupski*, 130 S.Ct. 2485, 2497–98.
[21] 766 A.2d 1 (Del. 2001).

the conduct alleged in the complaint.[22] In that circumstance, we found that the amended complaint satisfied the requirements of Rule 15(c).[23]

(16) Lovett failed to show under the third requirement of Rule 15(c) that Fitzpatrick, Berry, and Condon knew or should have known that, but for a mistake concerning identity, they would have been named in the original suit. The Superior Court did not err in denying Lovett's motion to amend the complaint.

(17) Lovett next contends that the Superior Court abused its discretion in denying his motion for relief from the January 5, 2011 order. Lovett initially filed a motion for relief from the order on grounds that, had Lovett known the Superior Court would reconsider the Commissioner's ruling, Lovett "would have brought to the Court's attention the untrue assertion that the Department of Justice had not made contact with the officers who were attempted to be added and they were not aware of the lawsuit within 120 days after filing." On appeal, Lovett presents the motion as one for reargument and one for relief under Rule 60(b).

(18) To the extent that Lovett's motion could be construed as a motion for reargument, the motion was not timely filed under Rule 59(e). Rule 59(e) requires that the motion be filed within five days of the decision. Here, Lovett did not file the motion until January 20, 2011, fifteen days after the ruling.

[22] *Id*. at 6 & n.5.
[23] *Id*. at 7, 8.

(19) The motion also fails under Rule 60(b). We review the denial of a Rule 60(b) motion for abuse of discretion.[24] Here, Lovett does not specify the subsection of 60(b) under which he seeks relief, but appears to allege mistake and misrepresentation by the DOJ so as to implicate subsections (1), (3) or (6). "Relief under Rule 60(b) is an extraordinary remedy and requires a showing of 'extraordinary circumstances.'"[25] Here, the record does not support a finding of such extraordinary circumstances. Accordingly, the Superior Court did not err in denying Lovett's motion for reargument and/or relief.

(20) Finally, Lovett's notice of appeal cited the Superior Court's Opinion and Order dated April 26, 2011 which granted summary judgment in favor of the Delaware State Police and State of Delaware after Lovett's concession that Pietlock should be dismissed from the action. Because Lovett has not argued the merits of that decision in his opening brief, any argument of error by the Superior Court in granting that summary judgment in favor of defendants has been waived.[26]

[24] *State v. Skinner*, 632 A.2d 82, 84 (Del. 1993).
[25] *Walls v. Cooper*, 645 A.2d 569, 1994 WL 175604, at *1 (Del. 1994) (TABLE) (citing *Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979)).
[26] Del. Supr. Ct. R. 14(b)(vi)(3).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice